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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 693

THE UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Opinions Below.

The opinion of the District Court (R. 6) is reported in 6 F. Supp. 839. That of the Circuit Court of Appeals (R. 10) is reported in 73 F. (2) 265.

Jurisdiction.

The petition for a writ of certiorari was filed February 9, 1935 and granted March 4th, 1935 (R. 14). Jurisdiction of this court is invoked under Sec. 240-a of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether, after the repeal of the Eighteenth Amendment to the Constitution, the United States may recover upon a bond, executed pursuant to Sec. 26 of Title II of the National Prohibition Act, under which a boat seized under that Act had been released to the owner upon the condition that it be returned "on the day of the criminal trial to abide the judgment of the court," where it appears that the boat was not so returned and the crew of the boat had pleaded guilty to the charge of possessing intoxicating liquors as an incident of transportation and had been sentenced, prior to the repeal of the Eighteenth Amendment.

Statement.

The brief for the United States contains a full, fair and comprehensive statement and for that reason such is omitted here, except to refer to the full conditions of the bond which are as follows:

Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, * * *.

Summary of Argument.

1. There was no final judgment ever obtained in the within cause.

2. Liability had not become "fixed" under the bond in suit.

3. The bond admittedly executed under Sec. 26 of the National Prohibition Act, is dependent upon the continued validity of that statute.

4. The complaint fails to allege sufficient facts upon which to base a recovery as delivery of the vessel was not a condition absolute of the bond. Payment, in the event of order of sale, without delivery of the vessel would discharge the bond. This, irrespective of the repeal of the Eighteenth Amendment to the Constitution of the United States.

POINT I.

No final judgment was obtained in the within cause prior to ratification of the Twenty-first Amendment.

There was no order of forfeiture of this bond ever made or entered. There was no judgment or decree ever entered with respect to the vessel released under this bond. The petitioner sought to obtain judgment by commencing an action on the bond more than two and one-half years after the criminal phase of the seizure was disposed of by a plea of guilty.

The petitioner's argument under Point I (Brief, p. 8), pre-supposes the existence of a final judgment. The complaint alleges no final judgment of forefeiture with respect to the bond in suit. In fact, the cause in the case at bar was the *modus operandi* by which the petitioner sought to procure a final judgment. Plainly, this is not a case in which a final judgment had been obtained against a vessel or its equivalent, the bond, prior to ratification of the Twenty-first Amendment. No judgment at all had been obtained, and while this cause was still pending, the Twenty-first Amend-

ment to the Constitution was ratified. The effect of that ratification without a saving clause extinguished all claims of liability or forfeiture under the National Prohibition Act.

U. S. v. *Chambers,* 291 U. S. 217.

POINT II.

Liability had not become "fixed" under the bond in suit.

There is but a claim of liability under the bond just as a claim of liability against a personal offender charged with violation of the National Prohibition Act. Unless final judgment in the sense that no right of appeal exists was obtained, the intervention of the ratification of the Twenty-first Amendment deprives the court of jurisdiction.

In the absence of judgment of forfeiture, the following cases cited by the Government are distinguishable from the case at bar:

U. S. v. *Davenport,* 266 Fed. 425;
U. S. v. *Zarafonitis,* 150 Fed. 97;
Joelson v. *U. S.,* 287 Fed. 106;
Southern Surety Co. v. *U. S.,* 23 F. (2) 55;
Hardy v. *U. S.,* 71 Fed. 158;
U. S. v. *Evans,* 2 Fed. 147;
U. S. v. *Dunbar,* 83 Fed. 151;
Detroit Fidelity & Surety Co. v. *U. S.,* 59 F. (2) 565;
U. S. v. *Sulvani,* 4 Fed. Supp. 775.

Those cases, without a single exception, present a fact situation in which a judgment of forfeiture upon the recognizance was duly had and entered. Such proceedings as were had thereafter in those cases were in execution of the judgment duly had and entered.

In the case at bar, as pointed out under Point I hereof, no judgment of forfeiture was ever declared or entered.

There was no forfeiture of this bond nor of the vehicle for which it was given established in any cause and such fact therefore is not pleaded in the complaint. There is no similarity between the bond in the case at bar and a bail bond given in a criminal proceeding for the appearance of the accused.

U. S. v. *Russo,* 7 Fed. Supp. 391;
U. S. v. *Randall,* 58 F. (2) 193.

Furthermore, *scire facias* could not issue as there is no record of any court proceedings resulting in a forfeiture upon which *scire facias* might issue. The mere failure to deliver the vessel would not ground forfeiture of the bond even if duly prayed for, for two conditions are still absent; (a) notice to the surety, and (b) conviction for transportation under Sec. 26 of the National Prohibition Act.

In any event, mere failure to return, not to the court but to the officer approving the bond is a non-compliance with Sec. 26 with the resultant necessity for the Court's adjudication in order to fix the penalty, which must be measured by the guilty participation of the owner or claimant. This is not necessarily the face value or half the face value of the bond, judgment for which had never been granted nor prayed except by the present suit.

The owner may be innocent, and his failure to deliver the vessel may be explained, and a forfeiture might never be had, or if had, could only be obtained as the result of a determination upon issues properly presented to the court for adjudication.

The Patricia, 1 Fed. Supp. 807.
U. S. v. *Bryan,* 3 Fed. Supp. 249.

With the repeal of the Eighteenth Amendment, the basic right to exact a bond under Sec. 26 is lost; the right to incur

forfeiture under Sec. 26 is gone. How then may the bond stand unless the statute survived the repeal by a saving clause? *If the action on this bond given under Sec. 26 survives the repeal then it must be held that the action against the vessel for which the bond had been given would survive the repeal, for to hold otherwise, would mean that the bond subjected the owner to more onerous conditions than if he had left the vessel under arrest.*

The fallacy of the Government's position is that it loses sight of the fact that whether the res itself was to answer or the bond in lieu thereof, the forfeiture, if any, would have to be the result of judicial action independent of the judgment in the criminal cause.

U. S. v. *Ames*, 99 U. S. 35 at pages 40, 41.

Obviously, no forfeiture can now be granted. Furthermore, the Government loses sight of the fact that except for the Eighteenth Amendment, the bond would not have been given; the vessel would not have been seized and the arrest would not have been made.

That the Government might have collected upon the bond if proceedings were pressed timely and diligently is beside the point. Certainly, some judicial order or decree declaring a default and forfeiture under the bond is the pre-requisite to ground a recovery upon the bond at this time. The cases cited in the Government's brief have no application to the case at bar. If the action were dependent wholly upon the common law, *scire facias* could only issue if a forfeiture was judicially declared upon the bond.

Detroit Fidelity & Surety Co. v. *U. S.*, 59 F. (2) 565.

There, the Court states:

> "The question as to whether or not any liability accrued against the libellant must be determined by

> the conditions existing at the time of the default *and the adjudication of forfeiture was a final judgment,* at least to the extent of a declaration that there had been a default or breach of the conditions of recognizance. The scire facias proceeding is but a continuation of the forfeiture proceeding insofar as the adjudication of forfeiture is concerned, • • •."

But the action is not dependent wholly upon the common law, for if there were no conviction in the criminal cause the power to keep the proceeds would disappear (after determination of the extent of the tainted interest of the claimant) and the jurisdiction would fail, for Sec. 26 provides, so far as pertinent:

> "The court *upon conviction* • • •, unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized • • •."

As the Circuit Court of Appeals stated (Record, p. 12):

> "It may be that the statute so infuses the bond that no action can be brought at all and no writ of scire facias issues *until conviction; just as no decree of forfeiture* can pass until then." (Italics ours.)

If the Government's position is correct, then the owner in securing possession of the property is subjected to more burdensome conditions than if the property were left in the custody of the seizing officer, for in the latter case, the intervention of the Twenty-first Amendment would save the property for him, while in the former, the bond would be forfeitable if only the property had not been delivered to the officer on the day of trial.

The fallacy of this argument seems apparent, for the very condition of the bond is commanded by the statute. If the bond were treated purely as a contract, the owner might offer the value of the vessel to the officer at this time, but no

order condemning the proceeds could be entered under Sec. 26.

The suit is brought on a statutory bond and the bond must be considered in the light of the requirements of the statute which gives it force and effect. The bond receives its construction both as to remedy and liability in the language of the statute pursuant to which the bond was exacted. That it is not a common law bond is practically conceded by the question presented for review.

The bond was

> "executed pursuant to Sec. 26 of Title 2 of the National Prohibition Act." (Government's Brief, p. 2.)

As stated in Corpus Juris, Vol. 9, Sec. 41, page 27:

> "Moreover, in order to uphold a bond as a valid common law obligation on which a recovery may be had as such, it must be done independently of the statute by the authority of which it was intended to be executed."

And as stated in Corpus Juris, Vol. 9, Sec. 43, page 28:

> "If the bond is dependent for consideration entirely on the validity of the statute, it becomes invalid when the statute is annulled and is not valid as a common law bond."

The Congress has done more than to invalidate the statute. By omitting a saving clause from the repealer it has, in effect, remitted all fines, penalties and forfeitures.

U. S. v. *Chambers, supra.*

There is no vested right to collect a penalty or to confiscate property pursuant to a forfeiture in proceedings had under the National Prohibition Act unless judgment became absolutely final and the time within which to appeal has

definitely expired. All penalties and forfeitures incurred by reason of the existence of the National Prohibition Act were, in effect, remitted by the repeal of the 18th Amendment and the adoption of the 21st Amendment without a saving clause. The very force and effect of a remission of a penalty is the surrender of that which the Government might have been justly entitled to, but which the Congress has declared it may not now exact.

POINT III.

A bond under Section 26 is dependent upon the continued validity of that statute.

It is conceded that the bond was given under Sec. 26 of the National Prohibition Act. That bonds given pursuant to statutes are construed in the light of the statute under which it was given needs no citation of authority. The rights and remedies are governed by the language of Sec. 26. **There was no order of sale of the vessel seized in the case at bar entered at the time of conviction of the persons arrested. There was no notice of intention to try the issue with respect to the title to the vessel.**

As stated in

U. S. v. *One Stephens Automobile,* 272 Fed. 188 at 190.

> "The order of sale would seem to follow automatically upon conviction. There is no provision for a trial touching the rights of claimants to the property at the time of the trial of the person arrested. In fact, such a hearing would seem to be collateral to any issue as to the guilt of the person arrested. No notice of the seizure of the property is provided by which to preclude parties interested therein, unless it be that the seizure itself is deemed sufficient for the purpose. If the seizure is to be deemed suf-

ficient, why provide later for advertising the sale in case no one shall be found claiming the property, and opportunity for claimants to appear in pursuance of the advertisement?

It is manifest that there is lack of definite procedure prescribed applicable in the first instance by which to determine the relative rights of all parties concerned in the property, so as to preclude them at once and for all time from further claiming any interest therein."

If the Government were to recover on the bond in suit, the measure of liability and the extent of recovery could only be determined by fixing the extent of the interest in the vessel which was tainted with guilty participation by the owner. This necessarily must be adjudged in accordance with the provisions of Sec. 26 of the National Prohibition Act.

U. S. v. *Warnell,* 67 F. (2) 831;
U. S. v. *Randall,* 58 F. (2) 193;
U. S. v. *One Ford Automobile,* 18 F. (2) 338.

This is the purest type of statutory bond, each condition contained therein conforming with the statutory requirements of Sec. 26.

Nor is the mere recital in the complaint of the failure of the principal to return the boat on the day of trial sufficient to establish a forfeiture of the bond and liability thereunder.

U. S. v. *Bryan,* 3 Fed. Supp. 249 at 250:

"The Government contends that, upon offering in evidence the bond, and proof of failure of Bryan to return the car on or before the day of the criminal trial, it is entitled to judgment.

Bryan (and his sureties) claims that the Government must go further and make the same proof it would require to make in a proceeding in rem to for-

feit the car, i. e., to prove, (a) the transportation of intoxicating liquor in the car, (b), the seizure of the car, (c), the arrest and conviction of the person or persons in charge of the car.

Bryan (and his sureties) also contends that they may show 'good cause' in this case and prevent judgment against them, in the same manner that Bryan, as the owner of the car, may show 'good cause' and prevent a judgment of forfeiture of the car in such a proceeding in rem.

Again to an extent following the practice in admiralty, I think Bryan (and his sureties) are right in their position and that the Government is wrong. The bond having, as stated, taken the place of the car, the Government, in order to recover thereon, must prove the same facts that it would have been required to prove to obtain a judgment of forfeiture, and Bryan (and his sureties) may make the same defenses that Bryan would be entitled to make in such a forfeiture suit. *Besides, I think this view is in accord with the spirit of the National Prohibition Act."*

The bond, under Sec. 26, is essentially a guarantee to pay to the United States a penal sum. The amount recoverable is not that which is named in the bond, but is that sum of money which represents the value in the res of the guilty interest of the claimant. It is a sum assessed for violating the Prohibition Law.

U. S. v. *Friedman,* 8 Fed. Supp. 829, at 832.

It clearly involves the idea of punishment for infraction of the law,—the definite function of a penalty.

O'Sullivan v. *Felix,* 233 U. S. 318, 324;
Lipke v. *Lederer,* 259 U. S. 558, and

As stated in

U. S. v. *One Ford Coupe Automobile,* 272 U. S. at 325:

> "If Sec. 26 is the only applicable provision for forfeiture of the car, the interest of those who are innocent are not forfeited."

It is the illegal use with knowledge of the claimant that fixes a penalty and the amount thereof. These essential averments do not appear in the complaint. Nor may the guilty use or acquiescence therein be presumed as against the claimant.

U. S. v. *Choteau,* 102 U. S. 603;

And as stated in that case:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term penalty involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

The failure to re-deliver the vessel did not fix liability at the face value of the bond or at half thereof.

U. S. v. *Warnell, supra;*
U. S. v. *One Ford Automobile,* 18 F. (2) 338;
U. S. v. *Randall, supra.*

The cases of

Gulf States Steel Co. v. *U. S.,* 287 U. S. 232;
U. S. v. *John Barth,* 279 U. S. 370

have nothing in common with the case at bar.

The distinction between an estoppel which may be invoked to give validity to what the parties contemplate shall constitute an agreement between them and a repealer which ousts the Court of its jurisdiction is too clear to require any finespun argument.

In

U. S. v. *John Barth, supra,*

and that line of cases, the obligor wishes to hold off execution and gives the bond for that reason; the obligee understands that this delay of execution will not destroy liability. Nothing of that sort is presented in the case at bar. No penalty had arisen before the bond was given for the release of the vessel. Perhaps no penalty would ever arise. If it did however, the bond was to make certain that it should be discharged.

U. S. v. *Springer & Lotz,* 69 F. (2) 819.

If, as stated in

Daniels v. *Tearney,* 102 U. S. 415,

the bonds were statutory bonds, they would have been rendered void by reason of the invalidity of the statute and no recovery could be had on it. Furthermore, there is present in a repealer without a saving clause, the Legislative act of remission. This goes further than merely voiding the bond. It commands restitution even after collection of the penalty providing the judgment thereon had not become final.

Yeaton v. *U. S.,* 5 Cranch, 281, 3 Law Ed. 101.

The intervention of the repeal in the case at bar did not create a defense to the action, but deprived the Court of jurisdiction to exact the penalty under the bond. There is no similarity between the case at bar and those cases relied upon by the Government in which an estoppel was invoked. There is nothing unjust or inequitable in resisting a claim of forfeiture under the guise of an action on a bond when the Legislative will has expressed that no such forfeiture shall accrue. There is no unjust enrichment. The Congress has remitted the penalty. Furthermore there never was any adjudicated liability on the bond in suit.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the judgment below be affirmed.

LOUIS HALLE,
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On the Brief,
MILTON R. KROOPF,
OTTO B. SCHMIDT.

April, 1935.

7

SUPREME COURT OF THE UNITED STATES.

No. 693.—October Term, 1934.

The United States of America, Petitioner, vs. James A. Mack and Concord Casualty & Surety Company, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 20, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

On July 31, 1930, an American motor boat, the Wanda, had on board a cargo of intoxicating liquors. The Collector of the Port of New York seized the vessel and arrested the crew for an offense against the National Prohibition Act. Thereupon the respondent Mack claiming to be the owner of the vessel gave a bond as principal with the other respondent as surety in the sum of $2,200, double the value of the vessel, conditioned that the bond should be void if the vessel was returned to the custody of the Collector on the day of the criminal trial to abide the judgment of the court. A copy of the bond is printed in the margin.[1] The members of

[1] "Know all men by these presents, that I, James A. Mack, of No. 4 Hickory Street, Wantagh, Long Island, N. Y., principal and Concord Casualty and Surety Company, of No. 60 John Street, New York City, a corporation, organized and existing under laws of New York State, surety, are held and firmly bound unto the United States of America in the penal sum of two thousand two hundred and 00/100 ($2,200.00) dollars (double the value of the vehicle or conveyance), money of the United States, for the payment of which well and truly to be made we bind ourselves jointly and severally, our heirs, executors, administrators, successors, and assigns firmly by these presents.

"Whereas, the following described vehicle or conveyance has been seized pursuant to section 26 of title II of the National Prohibition Act, to wit: The American motor boat 'Wanda.'

"And, whereas, the aforesaid principal has made application for the return of said vehicle or conveyance, claiming to be the owner thereof:

"Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which